

TITLE 326 AIR POLLUTION CONTROL BOARD

LSA Document #99-91

SUMMARY/RESPONSE TO COMMENTS FROM THE THIRD COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from June 1, 1999, through June 21, 1999, on IDEM's draft rule language. IDEM received comments from the following parties:

Baker and Daniels on Behalf of General Electric	(GE)
Eli Lilly and Company	(ELC)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: The rule must protect confidential information acquired by IDEM, regardless of when a company makes a claim of confidentiality. The proposed rule should be revised to allow a person to request confidential treatment within a reasonable time after that person discovers that IDEM has acquired information either through the action of the department, or the actions of a third party.

There may be occasions when IDEM acquires information through its own action and a person does not even know such information has been acquired. In such cases, a person cannot make a timely claim of confidentiality under the proposed rule.

The proposed rule leaves unprotected information obtained from "nontraditional" sources, such as third parties. The rule makes no allowance for a person to claim confidentiality if a third party provides information to IDEM. (GE)

Response: Under 326 IAC 17.1-2-1, the scope of this rule involves only information received from persons requesting confidential treatment of that information. Third party sources of information are not covered under this rule; see IC 13-14-11-3 which refers to confidentiality claims from persons required to submit records to the department or a board. Moreover, information received from a third party is likely already available to the public.

All information obtained or received by the department is public record and is presumed to be information accessible by the public unless that information is specifically excepted from disclosure under IC 5-14-3-4. All information received that is claimed as confidential is treated as confidential until a determination is made. It is necessary that the claim be made at the time of the acquisition of information by the department so that the information may be treated as confidential from the time of acquisition. The rule does address requests for confidential treatment of materials received in non-traditional ways, such as inspections; see 326 IAC 17.1-4-1.

Comment: The rule should account for delivery of information by nontraditional means. The proposed rule fails to take into account confidential information submitted by any means other than by paper or similar hard medium. (GE)

Response: The current language does allow for delivery of information by nontraditional means. Separation and designation of information as confidential is the core requirement. The purpose of the language is to protect the interests of the person making the confidentiality claim by making clear to IDEM what information is claimed as confidential, so it can be separated from information accessible by the public. For instance, undeveloped film in an inspector's camera can be developed, and the resulting photographs designated by the submitter as confidential under the procedures outlined in 326 IAC 17.1-4-1(c).

Comment: The rule should specify more clearly how and to what extent information submitted in support of a confidentiality claim will be protected. The proposed rule is not clear whether a person must follow the procedures of the proposed confidentiality provisions for the submittal of confidential supporting information. In addition, the rule is not clear on how long confidential treatment of the supporting information will last.(GE) (ELC)

Response: Confidential supporting information will be given the same protection as information that is the subject of the claim. Confidential information submitted in support of a claim must follow the format for claiming information as confidential as specified in 326 IAC 17.1-4; see, specifically, 326 IAC 17.1-4-1(c). If that supporting information is also determined to be confidential it will be afforded confidential treatment in accordance with 326 IAC 17.1-4-1(e). Under the rule, the commissioner's determination on the claim of confidentiality also addresses the confidentiality of the supporting information. IDEM will clarify the proposed language to specify that supporting information may be claimed as confidential and determined to be confidential.

Comment: IDEM should delete proposed rule language that adds requirements to the appeal process. If IDEM chooses to include such language, however, IDEM should merely reference statutes and regulations governing appeals, and not add requirements. Proposed 326 IAC 17.1-6-1(1) and (2) are unnecessarily duplicative.

In addition, proposed 326 IAC 17.1-6-1 appears to conflict with regulations promulgated by the Office of Environmental Adjudication ("OEA"). The proposed rule at 326 IAC 17.1-6-1 mandates that "a copy of the petition shall be served on the commissioner" concurrent with the filing of a petition for review. The OEA rules on the other hand, mandate that "if a party is represented by an attorney or another authorized representative, service of a document must be made upon the attorney or other authorized representative." (GE)

Response: The requirement of service on the commissioner does not conflict with the OEA

rules. 315 IAC 1-3-2(e) specifies that a copy of the petition for administrative review shall be sent to the agency. IDEM is designating a specific office within the agency to receive that information. The purpose of the requirement is to ensure that the appropriate IDEM program receives timely notice of an appeal. This ensures that the information in question will be handled and filed in an appropriate manner during the appeal process. The language describing the administrative appeal process and initiation of an appeal has been included at the request of the U.S.EPA to comply with program delegation requirements.

Comment: IDEM should delete the needlessly burdensome requirements of draft 326 IAC 17.1-4-1(d). Submission of additional information supporting a claim of confidentiality is not required by statute. Suggested language was provided. Additionally, alternative suggested language was provided in an attachment which provided for a narrative statement to be used in support of a claim. (ELC)

Response: IDEM has amended this language to require only a brief affirmation that a claim invokes a statutory allowance of confidentiality. However, in the case of trade secrets IDEM is requiring that the claimant make an affirmative showing of how the object of the claim meets the definition of trade secret at IC 24-2-3-2. Without a supporting statement, for instance, that a “trade secret” has in fact been protected from disclosure, IDEM cannot assume that information should be excepted from disclosure to the public. The commissioner cannot make a reasoned determination without information sufficient to support the claim.

Comment: Lilly recommends that the proposed language be amended to require the commissioner to notify a claimant of her intent to deny the claim and to provide an opportunity to submit additional information in support of the claim. Suggested language was provided. (ELC)

Response: IDEM will incorporate this procedure into proposed rule language. Persons will be notified of the commissioner’s intent to deny a claim and allowed an opportunity to submit additional supporting information under 326 IAC 17.1-5-2.